United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

75-1225

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1225

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS DUVALL and HENRY JONES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

T. BARRY KINGHAM,
JOHN D. GORDAN, III,
Assistant United States Attorneys
Of Counsel.

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PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING

Preliminary Statement

The United States of America respectfully petitions for rehearing in part of the decision of this Court (Friendly, Lumbard and Mulligan, *C.JJ.*) filed February 26, 1976, affirming the convictions of Thomas Duvall and Henry Jones for conspiracy, uttering forged Treasury Checks, and possession of stolen mail in violation of Title 18, United States Code, Sections 371, 495 and 1708, respectively.

Reasons for This Petition

This Court affirmed Duvall's conviction, holding that the trial court, the Honorable Charles E. Stewart, Jr., United States District Judge, had erroneously failed to suppress evidence of a post-arrest statement made by Duvall to Assistant United States Attorney Carey, but

that the error was harmless beyond a reasonable doubt. Slip op. at 2143. The Government agrees that any possible error *is* harmless under the circumstances of this case. However, we respectfully submit that this Court's opinion misconstrues the evidence adduced at the suppression hearing and at trial on the issue of the voluntariness of Duvall's statement to Mr. Carey. The result, in Part IV of the Court's opinion, is a holding in the words of *Miranda* v. *Arizona*, 384 U.S. 436, 476 (1966), that the Assistant United States Attorney "threatened, tricked, or cajoled [Duvall] into a waiver." The Government respectfully submits that the record does not support that conclusion. While the Court held that the admission of the evidence found to have been obtained in violation of Duvall's *Miranda* rights was harmless error and accordingly affirmed Duvall's conviction, this Court's finding that an Assistant United States Attorney violated *Miranda* is exceedingly damaging to the prosecutor's personal and professional reputation, and, we respectfully submit, both unwarranted and unfair.

ARGUMENT

Duvall's statement to the Assistant United States Attorney was by no means shown to have been coerced.

At the trial of this case, the Government offered into evidence the statements made by Thomas Duvall to Assistant United States Attorney Michael Q. Carey prior to Duvall's arraignment. The statements, as this Court found, were mostly false and intended to be exculpatory. The Court held, however, that although Duvall had waived his right to remain silent and to the assistance of counsel, the waiver had not been "free from any suggestions of pressure or threats." Slip op. at 2139. In so holding, the Court premised its opinion on the view that:

> "Duvall testified that the Assistant United States Attorney had told him that the charges carried 'a possible sentence of a hundred years.' The Assistant 'couldn't say' that he hadn't. The judge assumed that the Assistant had said what Duvall claimed." *Id.*

The record, however, does not support this Court's interpretation of the evidence (see slip op. at 2139).

Duvall did not testify that Carey had told him he faced "a possible sentence of a hundred years." On direct examination he testified as follows:

> "Q. Did Mr. Carey tell you anything about respect to sentence, any sentence you might face in this case? A. He told me that if I cooperate with him—he said usually these cases don't usually go to Court. I was never arrested by the Federal Government before, so I am thinking—I am thinking that Mr. Carey, by me answering the questions that he asked me, was going to allow me to leave, so I had agree with him to answer the questions that he asked me.
>
> Q. Before he asked you the specific questions and before you reached this point about thinking that you might be allowed to leave, did he say anything to you in terms of numbers of years that you might face?
>
> Mr. Kingham: The same objection.
>
> A. He told me if I don't cooperate I *would get* a hundred years." (H. 1696)* (emphasis added).
>
> * * * * *
>
> "Q. What did he say in front of the magistrate that you recall? A. He asked the magistrate for —first of all when we first went in there, the attorney that was representing me at the time,

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* "H." refers to the transcript of the suppression hearing; "Tr." refers to the trial transcript.

Mr. Stone, him and Mr. Carey was presenting my case to the Judge and he told the Judge that this is a very serious crime and that it involved a quarter of a million dollars.

Q. Who said this? A. Mr. Carey That if I get convicted I could get a hundred years. My lawyer in turn told him 'Your Honor, if you gave him a hundred years, where would he do it at? I don't think he will live a hundred years.'

"So anyway Mr. Carey asked for $15,000 bail for me and the magistrate—granted that but when they gave bail to Henry Khalid and Brother Rassoul the bail was $5,000, so I had raised my hand to speak to Judge Raby and he then lowered my bail to $5,000 but it was never actually into effect or even though my bail was $5,000, when they took me over there the bail was still the same amount, it was left at $10,000 and they never recognized the $5,000 bail." (H. 1698-99).

On cross-examination, Duvall testified:

"Q. Did you ask the Magistrate to lower your bail? A. I am trying to recall the time that bail was set. I remember going to court and speaking to Mr. Stone, the attorney; and I remember Mr. Carey telling Judge Raby that there was a quarter of a million dollars involved and if I get convicted I would get a hundred years. And after I heard this here from the District Attorney, I was shocked and I sat down. It was not until later in the proceedings that Henry Khalid and Rassoul Porter, Rassoul, were brought before the Magistrate's desk and they were given a $5,000 bail, that I raised my hand, before and was rejected from the courtroom, and I asked the Magistrate to lower the bail, which he did lower the bail to $5,000, the same as their bond, but it was never recognized." (H. 1820-21).

In contrast to Duvall's testimony, Assistant United States Attorney Carey stated on cross-examination by Duvall's counsel:

> "Q. Do you recall using the phrase, a possible sentence of a hundred years in connection with this interview with Mr. Duvall? A No.
>
> Q. Do you recall using that phrase, a possible sentence of a hundred years, or words to that effect, during the arraignment and the bail argument before the magistrate that afternoon? A. No,
>
> Q. Do you recall not having used that phrase? A. I can't say that I did not use that phrase or something similar to it." (H. 1312).*

In addition, as this Court noted in its opinion, slip op. at 2130 n.7, "Gniazdowski, who at the suppression hearing testified that he had been present during the Assistant United States Attorney's interview, went on to deny at trial that the Assistant United States Attorney had made the statement that Duvall faced a one hundred year sentence." ** (Tr. 703).

Judge Stewart made no resolution of the contradiction in facts. Rather, in denying Duvall's motion to suppress the statements given to Mr. Carey, the Court stated:

> "I am also going to assume that he was told—I think there is at least in the record, assertions that he was told on more than one occasion about the possibility of facing a hundred years and I assume that this was said to him." (H. 1871).

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* Carey testified on this issue before Duvall did.

** Any review of the determination of the District Court on Duvall's motion to suppress properly includes consideration of Gniazdowski's trial testimony. *Cf. United States* v. *Canieso*, 470 F.2d 1224, 1226 (2d Cir. 1972).

Later, the Court recognized the uncertainty of its remarks:

> "*If I am correct in my assumption* that *somebody may have said* to Mr. Duvall 'You face a hundred years' or 'Your exposure is a hundred years' I am concerned about that." (H. 1872) (Emphasis added).

Thus this Court's ultimate conclusion—that Duvall's pre-arraignment questioning by Mr. Carey was prefaced by "a warning from the prosecutor that, if the case goes to trial, he can be sentenced to 100 years in prison", slip op. at 2139—is based neither on undisputed testimony nor on any findings of fact by the District Court. Duvall's testimony about this alleged warning was squarely controverted by the trial testimony of Agent Gniazdowski. Furthermore, Mr. Carey's testimony that "I can't say I did not use that phrase [a possible sentence of a hundred years] or something similar to it" was hardly an admission that he had made such a statement, following closely as it did his testimony that he did not "recall"—defense counsel's term in the question put—"using the phrase . . . in connection with the interview with Duvall." Indeed, since Mr. Carey's admission that he couldn't "say I did not use that phrase or something similar to it" was immediately preceded by a question directed not to the pre-arraignment interview but rather to Mr. Carey's recollection of the use of the phrase "during the arraignment and the bail argument before the Magistrate that afternoon", the record is hardly clear that Mr. Carey's inability to assert categorically that he hadn't used "that phrase or something like it" related to anything but the bail hearing. This view is strongly supported by Duvall's testimony on cross-examination that Mr. Carey had said to the Magistrate at the arraignment that Duvall faced a hundred year sentence and that "after I heard this here from the District Attorney I was shocked and I sat down." (H. 1820-21).

Accepting, *arguendo*, Duvall's assertion that Mr. Carey did make this remark to the Magistrate, it is impossible to understand how Duvall could have been "shocked" if Mr. Carey's statement to the Magistrate was simply a repetition of what Duvall had already been told by Mr. Carey at the pre-arraignment interview not long before.

Moreover, it is exceedingly difficult to understand why the Court, in assessing the record on a factual point in respect to which Duvall's testimony was squarely controverted by Agent Gniazdowski's and, almost as squarely, by Mr. Carey's, should assume that Duvall was telling the truth. Not only did this Court, in the context of the threat which Duvall claimed Agent Chodosh made on the day of arrest, accept as not "clearly erroneous" a presumed disbelief by the District Court of Duvall's testimony, slip op. at 2136-2137, any examination of Duvall's testimony about Mr. Carey's interview with him establishes that Duvall's version should not have been credited in any respect. In virtually the same breath in which Duvall claimed that Mr. Carey "told me if I don't cooperate I would get a hundred years", Duvall likewise asserted that Mr. Carey had also told him "that if I cooperate with him—he said usually these cases don't usually go to Court." That Mr. Carey could have said such a thing—or, under the circumstances, that Duvall could have entertained the illusion, as he claimed, "that Mr. Carey, by me answering the questions he asked me, was going to allow me to leave"—is absurd.

Equally unsupported, we respectfully submit, is this Court's apparent conclusion that Judge Stewart accepted Duvall's testimony that Mr. Carey had threatened him with a hundred year sentence at the pre-arraignment interview. The District Judge's assumption, as the quoted excerpts of his oral opinion make clear, was exceedingly tentative and appears to have been made simply for the sake of argument, and Judge Stewart never "assumed"

that the person who had told Duvall that he faced a hundred year sentence was Mr. Carey. The District Court's last expression of his "assumption" was that "*somebody may have said* to Mr. Duvall 'you face a hundred years' or 'your exposure is a hundred years'." This was hardly a finding that Mr. Carey had actually done what Duvall claimed, and indeed this Court suggested that Judge Stewart was confused about Duvall's having been told about facing a hundred years "on more than one occasion"—"The judge may have been lumping this together with Duvall's claim concerning Chodosh's threat about 'not seeing the light of day' again." Slip op. at 2130 and n.7.*

The net of the matter is that this Court has elevated a sharply disputed factual issue not the subject of findings or even particularly precise assumptions by the District Judge, who clearly thought what he assumed to be irrelevant to the legal questions before him, into a fact conclusively settled by the record which is then made the basis of a finding of a serious dereliction of duty by an Assistant United States Attorney. For the reasons stated, we respectfully submit that the conclusion reached by this Court is unfair and its factual basis erroneous. Moreover, even assuming that such a factual finding could ever properly be made by an appellate court on such a record as in this case, *but see United States* v. *Canieso*, 470 F.2d 1224, 1228-1229 (2d Cir. 1972) (Friend-

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* In fairness to Judge Stewart, we find inexplicable the predicate for this suggestion of the Court—"We have found only one instance at which this remark was said to have been made, viz., during the Assistant United States Attorney's interview." *Id.* It is hard to see how this Court could have reached this conclusion since Duvall explicitly testified at the suppression hearing (H. 1698, 1820-21), in passages quoted *supra* at 3-4, that Mr. Carey had also said to the Magistrate at the arraignment that Duvall "could get a hundred years" if convicted.

ly, *Ch.J.*), the finding was unnecessary to the judgment of this Court, given its ultimate conclusion of harmless error. Under these circumstances, we respectfully submit that this Court should withdraw its denunciation of the Assistant United States Attorney, based as it is on legal and factual conclusions never reached by the court below. The Court's reproach, in the context of this case, has no legal relevance and can have no other effect than to cause unwarranted damage to the personal and professional reputation of the Assistant United States Attorney involved.

CONCLUSION

The opinion of the Court should be modified.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

T. BARRY KINGHAM,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. BARRY KINGHAM being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of March, 1976 he served 2 copies of the within ~~brief~~ petition by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York, NY 10013

O.T. Wells, Esq.
350 Broadway
New York, NY 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

MICHAEL B. MUKASEY
Notary Public, State of New York
No. 31-9343570
Qualified in New York County
Commission Expires March 30, 1976

T. Barry Kingham

Sworn to before me this
15th day of March 1976